United States courts, the idea has been advanced that there is a federal common law.[16] But any such law would be exercised over the territory of the states, and in a given territory there can be but one law in existence at one time. That law, even though subject to alteration by two distinct sovereigns, as in this country where a federal statute changes the law of every state, must nevertheless be the law of the territory or state. And it is consequently the state law which the federal courts are interpreting.[17] That federal decisions are followed in disregard of state court decisions does not argue the existence of a federal common law, but is simply an illustration of the essential feature of the common as distinct from the civil law — the authority of precedent.

MUTUAL EXCLUSIVENESS OF THE BUYER'S REMEDIES FOR BREACH OF WARRANTY IN SALES OF PERSONALTY. — It is almost universally recognized that for the sellers breach of warranty the buyer has two remedies: an action or counterclaim for damages on the contract,[1] and recoupment in a suit for the purchase price.[2] Rescission is also allowed by a number of States,[3] although denied by about an equal number[4] and by the English courts.[5] An interesting question is the consistency of these remedies. In a recent case in a jurisdiction where rescission is allowed, it was held that even under a code system of pleading a buyer cannot recover consequential damages when the case has been tried on the basis of rescission. *Houser & Haines Mfg. Co.* v. *McKay*, 101 Pac. 894 (Wash.). This decision goes on the ground that the remedies by rescission and by suit on the contract are inconsistent; and that therefore the doctrine of election allows the pursuit of one only.[6]

The doctrine of election of remedies is based not on strict estoppel but on a distinct principle of public policy which requires that a defendant shall not be subjected to two inconsistent actions when the plaintiff is amply protected by one.[7] It does not apply, however, where a prior suit has been brought in ignorance of material facts,[8] or has been defeated either because brought before accrual of the right of action,[9] or because incompatible with the facts of the case.[10] But two actions, properly brought, of which one relies upon the existence of a contract and the other upon its disaffirmance,

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[16] A federal common law was also supposedly established by certain regulations of interstate commerce. See 15 HARV. L. REV. 224.

[17] For a concurring view of this problem arising under the Australian Constitution, see Clarke, Australian Constitutional Law, p. 194.

[1] Mondel *v.* Steel, 8 M. & W. 858; Underwood *v.* Wolf, 131 Ill. 425.

[2] Poulton *v.* Lattimore, 9 B. & C. 259.

[3] Bryant *v.* Isburgh, 79 Mass. 607.

[4] Freyman *v.* Knecht, 78 Pa. 141.

[5] Street *v.* Blay, 2 B. & Ad. 456; 15 HARV. L. REV. 148; 14 *ibid.* 327. Rescission is not allowed by the Sales of Goods Act. Sales of Goods Act, § 53 (1).

[6] See Thompson *v.* Howard, 31 Mich. 309.

[7] See Emma Silver Mining Co. (Ltd.) *v.* Emma Silver Mining Co. of N. Y., 7 Fed. 401, 419.

[8] Goodger *v.* Finn, 10 Mo. App. 226.

[9] Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133.

[10] McLaughlin *v.* Austin, 104 Mich. 489.

are clearly inconsistent and both cannot be taken advantage of.[11] Thus a suit to judgment upon a written contract as executed bars the right to a reformation of the contract in equity on the ground of mistake.[12] Similarly, it is generally held that there can be no rescission for fraud after the contract has been affirmed by an action for deceit.[13] And the converse is also true.[14]

The basis of the buyer's relief by recoupment for breach of warranty is that, since he has not received what he contracted for, he should pay only the actual value to himself of what he has received. It is inherently similar to a recovery in quasi-contract,[15] and hence should be treated as a disaffirmance of the contract.[16] A leading English case allows an action on the contract after recoupment, on the ground that the buyer could receive no compensation for consequential damages by recoupment; [17] but the American cases to the contrary seem correct.[18] And the same reasoning would oppose recovery by both recoupment and rescission. Where, however, the consistency of the remedies of rescission and action on the contract is concerned, the proper course is not so clear. It has been argued that on principle the buyer should have the right to rescind the transfer of property without rescinding the contract.[19] No doubt the parties might so agree. But in the absence of such agreement the authorities support the decision in the principal case.[20] According to principles of contract law, the two remedies should be coexistent; but, probably because the remedy for breach of warranty was originally in tort,[21] the courts have never viewed the matter in this light. And in the Sales Act it is provided that "when the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.[22] The argument relied upon in the dissenting opinion of the case under discussion, that under the Code a plaintiff may unite several causes of action arising out of the same transaction, is not sustainable. The Code removes the technical forms of action, but it does not purport to alter the substance of a party's rights.[23]

BROKEN TRANSIT IN SALES OF PERSONALTY. — Lord Mansfield's opinion that the seller's right of stoppage *in transitu* lasts until actual corporal delivery to the buyer is no longer followed.[1] On the other hand, not every

[11] See Johnson-Brinkman Commission Co. *v.* Mo. Pac. Ry. Co., 52 Mo. App. 407.
[12] Thomas *v.* Joslyn, 36 Minn. 1.
[13] Kimball *v.* Cunningham, 4 Mass. 502; see Stuart *v.* Hayden, 72 Fed. 402, 411. But see Emma Silver Mining Co. (Ltd.) *v.* Emma Silver Mining Co. of N. Y., *supra.*
[14] Farwell *v.* Myers, 59 Mich. 179; but see Cohoon *v.* Fisher, 146 Ind. 583.
[15] See Mondel *v.* Steel, *supra.*
[16] Williston, Sales, § 612.
[17] Mondel *v.* Steel, *supra.*
[18] Gilmore *v.* Williams, 162 Mass. 351; Berman *v.* Henry N. Clark Co., 194 Mass. 248.
[19] Williston, Sales, § 612.
[20] Park *v.* Richardson & Boynton Co., 81 Wis. 399; Mundt *v.* Simpkins, 81 Neb. 1.
[21] See Schuchardt *v.* Allens, 1 Wall. 359, 368.
[22] Sales Act, § 69 (2). See Williston, Sales, § 604.
[23] See Maxwell *v.* Farnam, 7 How. Pr. 236; 7 Encyc. Plead. & Prac. 362, n.

[1] Dixon *v.* Baldwen, 5 East 175, 184.